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Supreme Court of the United States

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OCTOBER TERM 1946—No. .....

KATHERINE C. WILLIAMS,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM 1946—No.

KATHERINE C. WILLIAMS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petition of KATHERINE C. WILLIAMS herein respectfully shows to this Honorable Court:

A. Summary statement of the matter involved.

This proceeding was an appeal by the taxpayer, Katherine C. Williams, to the United States Circuit Court of Appeals for the Second Circuit from a decision and judgment of the United States District Court for the Southern District of New York, entered May 29th, 1945, dismissing taxpayer's complaint in an action by the taxpayer to recover the payment of $1,497,573.98, part of an Estate Tax deficiency assessment, paid by her under protest.

The taxpayer is the residuary legatee of her mother, Mrs. Mary Clark de Brabant (R. 33). Mrs. de Brabant created an *inter vivos* trust in 1928, eleven years before she died, and the Commissioner of Internal Revenue, in

assessing Federal Estate tax, included the corpus of the trust in the decedent's gross taxable estate (R. 34).

Two questions were raised below:

1. Was the transfer in trust made by decedent "in contemplation of death"; and

2. Should the transfer, because of the existence of a most remote possibility of reverter to grantor, be considered as "intended to take effect in possession or enjoyment at or after death"?

As the trust here in question was set up on February 6th, 1928, the Revenue Act of 1926 and, in particular, Sec. 302 (c) thereof, is controlling.

The relevant portions of Sec. 302 are as follows:

> "Sec. 302—The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, • • •
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise in contemplation of death or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth • • •" (C. 27, 44 Stat. 9).

The United States District Court for the Southern District of New York found for the petitioner on the first question stated above, but against her on the second, and dismissed the complaint (R. 87 to 88).

The petitioner appealed to the United States Circuit Court of Appeals, Second Circuit, which affirmed the judgment below on December 26th, 1946 and the order of affirmance was filed by the Clerk on the same day. The

Order for Mandate of the United States Circuit Court of Appeals, Second Circuit, was issued at the same time as the order of affirmance (R. 94).

The above questions were raised in briefs and arguments made before the District Court and the Circuit Court of Appeals, Second Circuit, and the judgments of those two Courts could not have been rendered without deciding the questions.

B. Specification of errors.

The Circuit Court of Appeals, Second Circuit, erred:

1. In failing to find that the transfer in trust of February 6th, 1928, by Mrs. Mary Clark de Brabant was not intended to take effect in possession or enjoyment at or after death, according to the intent and meaning of Sec. 302 (c) of the Revenue Act of 1926 (44 Stat. 9); and

2. In failing to find that the corpus of the trust should not be included in the decendent's gross estate; and

3. In failing to find that plaintiff (Petitioner) was entitled to recover the sum of $1,497,573.98; and

4. In affirming the judgment of the District Court dismissing the complaint.

C. Reasons relied upon for the allowance of the Writ.

The questions relied upon are Federal questions arising under the Revenue Act of 1926 and, in particular, Section 302 thereof. These questions resolve themselves into one basic one, namely, what was the intent of Congress, as expressed in the words of the said Section "in contemplation of death or intended to take effect in possession or enjoyment at or after his death?" Expanding this basic question, we have the following:

First: Did Congress in said Section 302 intend to include in a decedent's taxable estate every transfer made by him in trust or otherwise wherein the possession or enjoyment of the property transferred might *possibly* take effect at or after his death, or did Congress intend to tax only those transfers where there was some actual *expectation* on the part of the transferor that the transfer *would* or might take effect in possession or enjoyment at or after his death? In other words, did Congress intend to give to the word "intended" the common dictionary definition which includes the expectation that the "intended" event will, or is likely to occur and that the intender will take steps to make it occur.

Second: Should the rule *de minimis* which applies generally to all legal questions, be ignored or excluded from consideration in determining the meaning of Congress as expressed in said Section 302?

Third: Does a transfer made in trust take effect when made, where the grantor clearly expects and intends his property to go to his issue, but provides that, in the remote contingency of a failure of all issue, the property should revert to him, and in such case, does not the death of the grantor during the lifetime of his beneficiaries merely extinguish a possibility of reverter rather than constitute a transfer?

This Court has jurisdiction to review the determination of the United States Circuit Court of Appeals for the Second Circuit and to settle the questions above stated both because of conflicts between decisions of various Circuit Courts of Appeals (See *Commissioner* v. *Kellogg*, 119 F. (2) 54; C. C. A. 3, 1941; *U. S.* v. *Brown*, 134 F. (2) 372, C. C. A. 9, 1943; *Lloyds Estate* v. *Commissioner*, 141 F.

(2) 758, C. C. A. 3, 1943; *Commissioner* v. *Lasker*, 141 F. (2) 889, C. C. A. 7, 1944, in which it was held that a mere possibility of reverter would not bring the trust property into the taxable estate; and *Commissioner* v. *Bayne's Estate*, 155 F. (2) 475, C. C. A. 2, 1946, where the contrary was held), but more importantly because the proper determination of those questions is a matter affecting many persons and large sums of money, and is a matter of great public interest and importance in that *inter vivos* trust agreements have been executed by the thousands, and it was most common to provide therein that in the remote contingency that all of a number of beneficiaries should predecease the settlor, the trust property would revert to such settlor and those cases will continue to arise by the hundred as grantors die off.

Indicative of the above is the fact that in the short period between the decision of this Court in the *Hallock* case and the trial of the case at bar, scores of cases involving trusts of the kind above referred to were passed upon by various Federal Courts, including the United States Tax Court. In most of those cases the corpus of the trust was held not includible in decedent's gross taxable estate despite provisions for reverter to grantor.

Questions with respect to the includability of *inter vivos* trusts in the taxable estate of decedent and the application of Section 302 have been before this Court several times, and recently in *Helvering* v. *Hallock, supra, Fidelity-Philadelphia Trust Company* v. *Rothensies*, 324 U. S. 108 and *Commissioner of Internal Revenue* v. *Field*, 324 U. S. 113, which the Courts below held required the dismissal of the complaint. However, the facts in all of those cases were substantially different from the facts in the case at bar, and petitioner believes and submits that the questions

here presented have not been passed upon by this Court adversely to petitioner, as will be shown more definitely in the following points.

The direct questions presented on this application are, first, has this Court completely and thoroughly overruled *sub silentio* the group of cases decided some twenty years ago, including *May* v. *Heiner*, 281 U. S. 238; *McCormick* v. *Burnet*, 283 U. S. 784; *Burnet* v. *Northern Trust Company*, 283 U. S. 782 and *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, which decisions excluded from decedents' taxable estate the corpora of *inter vivos* trusts which included provisions for reverter to grantor, and second, must the *de minimis* rule be completely ignored in applying the provisions of said Section 302? Petitioner argues the negative of both questions.

In support of the contention immediately above, and in proof of the fact that the Courts below and the legal fraternity do not yet understand whether or not the *May* v. *Heiner* group of cases has been overruled and whether the existence of *any* possibility of reverter, however remote, brings an *inter vivos* trust into the taxable estate of a decedent grantor, see the very recent decision of *Estate of Edward P. Hughes* v. *Commissioner*, 7 T. C. No. 154, where the Court put a different construction upon the decisions of this Court from that placed thereon by the United States Circuit Court of Appeals, 2nd Circuit, in *Commissioner* v. *Bayne's Estate*, 155 Fed. 2d 475, and refused to follow that case and excluded from the taxable estate of the decedent Hughes the corpus of an *inter vivos* trust, despite the fact that under the terms thereof there was a definite possibility of reverter to the grantor.

Discussing this conflict very briefly:

In *Commissioner* v. *Bayne's Estate, supra,* the Court reluctantly held that the corpus of an *inter vivos* trust

created by decedent was includible in his taxable estate because of a most remote possibility of reverter to him, saying that it felt "constrained" by the decisions of this Court in the *Fidelity-Philadelphia Trust Co.* and *Field* cases, *supra,* and overruled its previous decision in *Helvering* v. *Proctor,* 140 Fed. 2d, 87, decided in 1944.

In *Estate of Edward P. Hughes* v. *Commissioner, supra* the United States Tax Court stated flatly that it refused to follow the decision in *Bayne's Estate, supra,* and that it would be guided by its former decisions in the cases of *Estate of Mary B. Hunnewell,* 4 T. C. 1096 (1945) and *Francis Biddle Trust,* 3 T. C. 832, thus refusing to give as sweeping an interpretation to the *Field* and *Fidelity-Philadelphia* decisions of this Court as the Circuit Court of Appeals for the Second Circuit had done.

In a pamphlet just issued, the Chemical Bank & Trust Company of New York comments upon the above conflict of decisions and upon the unsatisfactory and confused state of the law governing the includibilty of the corpora of trusts in decedent's estates.

D. Prayer for the Writ.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment of the Circuit Court of Appeals for the Second Circuit, dismissing plaintiff's complaint; that said judgment be reversed and that your petitioner may have such other and further relief in the premises as may be just and proper.

Dated: New York, N. Y., March 25th, 1947.

EDWARD L. BLACKMAN,
Counsel for Petitioner,
120 Broadway,
New York, N. Y.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

EDWARD L. BLACKMAN, being duly sworn, says:

That he is counsel for Katherine C. Williams, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true, as he thoroughly believes.

EDWARD L. BLACKMAN

Subscribed and Sworn to before me }
this 25 day of March, 1947. }

FLORENCE E. AVERY
Notary Public in the State of New York
Residing in Nassau County
Nassau Co. Clerk's No. 50
Certif. filed in N. Y. County
New York Co. Clk's No. 359 Reg. No. 240A7
Kings Co. Clk's No. 36, Reg. No. 183-A-7
My Commission Expires March 30, 1947

Supreme Court of the United States

OCTOBER TERM 1946. No.....

KATHERINE C. WILLIAMS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion of the District Court and the Court's findings of fact and conclusions of law are found on pages 81 to 88, of the Transcript of Record and the Memorandum Opinion of the United States Circuit Court of Appeals, Second Circuit, is found at page 93 of the Transcript of Record and is not reported.

II.

Jurisdiction.

1. The statutory provision believed by the petitioner to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended by the Act of February 13th, 1925, 43 Stat. 938 (28 U. S. C. A. Sec. 347).

2. The Statute involved is the Revenue Act of 1926, Sec. 302 (44 Stat. 9). The pertinent provisions of this Statute are as follows:

> "Sec. 302—The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, • • •
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise in contemplation of death or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth • • •".

3. The order of affirmance of the Circuit Court of Appeals, Second Circuit, was issued on the 26th day of December, 1946 (R. 94). This petition was docketed on the 26th day of March, 1947.

4. The basic question relied upon by petitioner to induce this Court to review the decision of the Circuit Court of Appeals is the intention of Congress in enacting the above quoted Section 302 of the Revenue Act of 1926, with respect the phrase "intended to take effect in possession or enjoyment at or after death". The direct question presented is: Has this Court overruled the *May* v. *Heiner* group of seven cases, and has it *held* that any possibility of reverter, however remote, brings an *inter vivos* trust into the taxable estate of decedent grantor, thereby giving an interpretation to the word "intended", as used in said Sec. 302, contrary to the commonly accepted definition thereof and thereby excluding the *de minimis* rule from application to such section.

There was the further question raised secondarily by the respondent that the transfer was made in contemplation of death. This, however, was not strongly urged and the Trial Court made a finding of fact which is in accord with the undisputed evidence that the gift was not made in contemplation of death.

III.

Specification of Errors.

The Circuit Court of Appeals for the Second Circuit erred:

1. In failing to find that the transfer in trust of February 6th, 1928, by Mrs. Mary Clark de Brabant was not intended to take effect in possession or enjoyment at or after death, according to the intent and meaning of Sec. 302 (c) of the Revenue Act of 1926 (44 Stat. 9); and

2. In failing to find that the corpus of the trust should not be included in the decedent's gross estate; and

3. In failing to find that plaintiff (Petitioner) was entitled to recover the sum of $1,497,573.98; and

4. In affirming the judgment of the District Court dismissing the complaint.

IV.

Statement of the Case.

The facts in this case are few and most of them were stipulated. Respondent called no witnesses. The statement of evidence consists of only 48 pages (R. 33-81).

The following findings were made by the District Court and were not disturbed by the Circuit Court of Appeals:

Petitioner is the daughter and residuary legatee of Mary Clark deBrabant, who died a resident of New York on the 19th day of December, 1939. Decedent's Executors computed the value of her estate and paid the Estate Tax thereon (Finding of Fact No. 1, R. 86, fol. 238; R. 33; R. 35). Several years later the Commissioner of Internal Revenue made an Estate Tax deficiency assessment of upwards of $1,500,000 against said estate, and this deficiency resulted from the inclusion in the taxable estate of decedent of the corpus of an *inter vivos* trust which had been created by decedent during her lifetime, by the terms of which she transferred to the Farmers Loan & Trust Company of New York money and securities in trust providing for the payment of the income to herself during her lifetime, and for the termination of the trust at the time of her death, and the payment of principal and accumulated income to her issue (Finding of Fact No. 1, R. 33-34, 10-11). Decedent had living issue at the time she made the trust of her daughter, petitioner in this case, and two granddaughters, and the proof showed that there was not more than one chance in two thousand that decedent would predecease her three named beneficiaries and not more than one chance in ten thousand that decedent would die without issue (Finding of Fact No. 2, R. 87; R. 74-5).

However, there was a provision in the Trust Agreement that in case decedent died without issue the trust property should pass as provided in her will, if she made one (R. 11, fol. 33).

Decedent made four wills shortly subsequent to the execution of the trust here in question, but obviously considered the reverter to her so remote and of so little import-

ance that she made no provision with respect thereto, nor even in reference thereto, in any one of her said wills (Finding of Fact No. 1, Stipulation of Facts §11, R. 49; R. 53-68).

FIRST POINT.

The case at bar falls squarely within the rule of the *May* v. *Heiner* group of cases and that fact was not denied by the Courts below, nor even by respondent.

While appellant's principal point is that the rule of law announced by this Court in *Reinecke* v. *Northern Trust Company,* 278 U. S. 339; *May* v. *Heiner,* 281 U. S. 238; *McCormick* v. *Burnet,* 283 U. S. 784; *Morsman* v. *Burnet,* 283 U. S. 783; *Burnet* v. *Northern Trust Company,* 283 U. S. 782 and *Shukert* v. *Allen,* 273 U. S. 543, which may be designated as the *May* v. *Heiner* group, squarely applies to the facts of the case at bar, that question will not be argued at this point, but will be reserved for petitioner's Fifth Point, where the facts of this case are distinguished from those in *Helvering* v. *Hallock, Fidelity-Philadelphia Trust Company* v. *Rothensies* and *Commissioner of Internal Revenue* v. *Estate of Field.* This course is followed as there was really no controversy with respect to the application of the rule of the *May* v. *Heiner* group to the case at bar, and because petitioner wishes to take up at the outset and refute the point upon which the case was actually decided by the Courts below, namely, that the entire *May* v. *Heiner* group of cases had been overruled by this Court.

SECOND POINT.

This Court in *Helvering* v. *Hallock* gave much more than lip service to the rule of *stare decisis*. It recognized the importance and validity thereof and took great pains to explain that its overruling of *Helvering* v. *St. Louis Trust Company* and *Becker* v. *St. Louis Trust Company* was not a real departure from that rule.

Further the fact that the Court expressly overruled the two *St. Louis Trust Company* cases, but remained silent with respect to the seven older cases, constituting "the *May* v. *Heiner* group", together with the fact that each of its reasons for overruling the two trust company cases furnishes grounds for sustaining the *May* v. *Heiner* group, makes *Helvering* v. *Hallock* a support for such group.

The decision of this Court in *Helvering* v. *Hallock* was cited and construed in scores of cases prior to the decision of this Court in the case of *Fidelity-Philadelphia Trust Company* v. *Rothensies* and *Commissioner* v. *Estate of Field, supra.** The almost unanimous interpretation put upon the *Hallock* decision in those lower court cases was that this Court had not overruled the *May* v. *Heiner* group. Those cases gave the only reasonable interpretation of the decision in the *Hallock* case.

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* NOTE: *Commr.* v. *Irving Trust Co.*, 147 F. (2) 946; *Helvering* v. *Proctor*, 140 F. (2) 87; C. C. A. (2); *United States* v. *Brown*, 134 F. (2) 372; C. C. A. (9); *Commr.* v. *Kellogg*, 119 F. (2) 54; C. C. A. (3); *New York Trust Co.* v. *United States*, 51 F. Supp. 733; Ct. of Cls.; *Schultz* v. *United States*, 140 F. (2) 945; C. C. A. (8); *Estate of Gallois*, 4 T. C. 840; aff'd. C. C. A. (9) 1945; *Estate of Campanari*, 5 T. C. 488; July 25th, 1945; *Estate of Matthews*, 3 T. C. 525; *Estate of Low*, 2 T. C. 1114; aff'd. 145 F. (2) 832; C. C. A. (2) 1944; *Philbrick* v. *Manning* (D. C. U. S. D. N. J.), decided Oct. 9th, 1944; *Floyds Estate* v. *Commr.*, 141 F. (2) 758; *E. Biddle Trust*, 3 T. C. 832; *Estate of Downe*, 2 Tax Court 967, Nov. 2nd, 1943; *Estate of Cass* v. *Commr.*, 3 Tax Court 562; *Estate of Houghton* v. *Commr.*, 2 Tax Court 871; *Estate of Allen* v. *Commr.*, 3 Tax Court 844.

Considering the Meaning of the *Hallock* Decision.

While it may seem extraordinary and perhaps presumptuous for a litigant to argue to the very judges who made a descision what their intent was, a judicial intent like a legislative intent can be determined by the public only from the language used, taken in connection with the circumstances in which used. A legislative intent determined in that way is controlling. A judicial intent should be determined in the same way and the fact that so many Courts in so many cases have determined that this Court did not overrule the *May* v. *Heiner* group should be controlling, unless those decisions are clearly contrary to the reasonable interpretation of the language used by this Court. They are not contrary, but give a reasonable, and the only reasonable, interpretation thereof.

Prior to the decision of this Court in the *Hallock* case, there had been ten decisions by it upon the question whether a transfer made by a decedent in his lifetime was intended to take effect in possession or enjoyment at or after the grantor's death and was therefore includable as part of decedent grantor's taxable estate. Nine of those cases dealt with *inter vivos trusts,* and, in all nine this Court held that the transfer in question was not intended to take effect in possession or enjoyment at or after grantor's death.

In the tenth case, *Klein* v. *United States,* 283 U. S. 231, the grantor spread all over the face of the instrument of transfer his expectation and desire that the property transferred should revert to him and upon the terms thereof there was a strong probability that this would happen.

In the last two cases decided before the *Hallock* case, namely, the two St. Louis Trust Company cases above referred to, the facts bore a close resemblance to those in

the *Klein* case, but this Court, in the face of the *Klein* decision, held that those trusts were not includible, distinguishing the *Klein* case. Then came *Helvering* v. *Hallock* with its thirteen page opinion.

That opinion expressly overruled *Becker* v. *St. Louis Company* and *Helvering* v. *St. Louis Trust Company,* but made no reference whatever to the seven cases decided some ten years previously, which have been termed "The *May* v. *Heiner* group." This fact alone should be sufficient to show that there was no intent to overrule those cases. However, the importance of the above fact is accentuated because the Supreme Court, in deciding the *Hallock* case, stated that it was undertaking to clear up "disharmony" between decided cases so that the lower courts would know how to apply the Estate Tax Law. The particular disharmony referred to was that between *Klein* v. *United States,* 283 U. S. 231, on the one hand, and *Helvering* v. *St. Louis Trust Company,* 296 U. S. 39, and *Becker* v. *St. Louis Trust Company,* 296 U. S. 48 on the other, and immediately after referring to these three decisions, this Court said:

> "Because of the difficulties which lower Courts have found in applying the distinctions made by these cases and the seeming disharmony of their results, when judged by the controlling purposes of the Estate Tax Law, we brought the cases here" (309 U. S. 110).

"The cases" immediately above referred to were the seven cases reviewed by this Court under the title of *Helvering* v. *Hallock.*

In the above circumstances, it seems impossible to consider that this Court overruled the *May* v. *Heiner* group in the face of the fact that its thirteen page decision contains no word of criticism of any one of said cases.

Greater importance should be given to the above because in the Government's brief, upon its application for certiorari in the *Hallock* case, the Solicitor General refers to the cases of *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784; and states that they, together with the *St. Louis Trust Co.* cases should be reviewed by the Supreme Court (Petition for Certiorari, pp. 14, 15). Thus, the decisions in those three cases of the *May* v. *Heiner* group had been brought directly to the attention of the Supreme Court.

In addition to the foregoing argument, the opinion of this Court recognizes the importance of the rule of *stare decisis* and states several reasons why in overruling the two *St. Louis Trust Company* cases it did not actually depart therefrom. No one of those reasons or explanations furnished any reason or excuse for overruling the *May* v. *Heiner* group and indeed, each of said reasons is a good ground for sustaining that group.

Thus, in explaining its decision and showing that it was not departing from the rule of *stare decisis*, this Court said in the *Hallock* case:

> "But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, *however recent and questionable*, when such adherence involves *collision with a prior doctrine* more embracing in its scope, intrinsically sounder, and verified by experience." (Italics ours.)

Again:

> "Nor have we in the *St. Louis Trust Company* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the Klein doctrine."

Each of the above explanations of the action of the Court in overruling the *St. Louis Trust Co.* cases is a reason for adhering to the rule of *stare decisis* with respect to the *May* v. *Heiner* group.

Thus, the Court refers to that rule as

> "• • • a principle of policy and not a mechanical formula of adherence to the latest decision, *however recent and questionable.*"

The cases which the Supreme Court overruled in the *Hallock* decision were both decided together only four years prior to the decision in the *Hallock* case. On the other hand, the rule of *May* v. *Heiner* group had stood for nearly nine years when the *Hallock* case was decided, had been reiterated in seven Supreme Court cases and had been followed by many lower Court cases.

The rule of the *St. Louis Trust Company* cases was "questionable" as stated in the quotation on page 17, *supra*, because it was clearly in conflict with *Klein* v. *United States.*

As stated in that quotation adherence to the rule of the *St. Louis Trust Company* cases involved "collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience", that of *Klein* v. *United States.* But adherence to the rule of the *May* v. *Heiner* group involved no collision with a prior doctrine and was in agreement with *Klein* v. *United States.* The same judges who unanimously decided the *Klein* case unanimously decided the *May* v. *Heiner* group.

Furthermore, the Supreme Court, stated in that quotation:

> "Nor have we in the *St. Louis Trust Company* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves."

This is a plain statement that where rules have existed around which by the accretion of time and the response of affairs substantial interests have established themselves, the Court should not depart therefrom.

Scores of cases had been decided and many millions of dollars of trust property had been dealt with under the rule of the *May* v. *Heiner* group, prior to the decision of the *Hallock* case and cases involving trusts established in reliance upon the *May* v. *Heiner* rule will continue to arise for years to come.

Thus, for the Court in the *Hallock* case to have overruled the *May* v. *Heiner* group would have violated directly every argument that it made in support of its departure from the rule of the *St. Louis Trust Company* cases and the direct and unequivocal overruling of those cases.

So far from overruling the *May* v. *Heiner* group, the argument of the Court in the *Hallock* case sustains those decisions. Thus, the Court says:

> "Our real problem is to determine whether we are to adhere to a harmonizing principle in the construction of Sec. 302 (c), or whether we are to multiply gossamer distinctions between the present cases and the three earlier ones. *Freed from the distinctions introduced by the St. Louis Trust cases, the Klein case furnishes such a harmonizing principle.*" (Italics ours.) (309 U. S., p. 118.)

Now, what did the Supreme Court consider the harmonizing principle which had existed prior to the distinctions introduced by the *St. Louis Trust Company* cases? That is found in the following quotations:

> "The inescapable rationale of this decision (*Klein* v. *U. S.*) rendered by a unanimous court, was that the statute taxes not merely those interests

> which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *intra vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. * * * It refused to subordinate the plain purposes of a modern fiscal measure to the wholly unrelated origins of the recondite learning of ancient property law" (p. 112).

The expression in the quotation above, "*inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise", obviously refers to *inter vivos* transactions where the grantor retains so large a control over the final disposition of the property which he has conveyed that his transfer too nearly approaches a testamentary disposition.

That rule is not a denial of, but an affirmance of the test which had been employed in the *May* v. *Heiner* group, as well as in *Klein* v. *United States.*

In the *Hallock* case, the trusts in question were "akin to testamentary dispoistions" to the extent that upon the snuffing out of only one life the property returned to the grantor and thus grantor had retained a large measure of control over the trust property.

Thus, it may reasonably be said that it was a plain purpose of said subdivision 302 (c) to prevent one from conveying property in such manner that if he should die soon the property would escape taxation as a part of his estate, but that if he should live long the property would come back to him.

Klein v. *United States* was a clear example of this and in each of the cases dealt with in the *Hallock* decision, property was transferred to A and if A outlived the transferor the property became the absolute property of A, but

if A predeceased transferor then the property came back to him.

To prevent such transfers escaping taxation might well be said to be "a plain purpose of a modern fiscal measure".

THIRD POINT.

It is unreasonable to assume that this Court in *Helvering* v. *Hallock* overruled the fair and reasonable decisions of the *May* v. *Heiner* group *sub silentio* in the face of the approval by Congress of the interpretation given by those cases to the phrase, "intended to take effect in possession or enjoyment at or after death".

That phrase first appeared in the Revenue Act of 1918 and it has been included in every Revenue Act since that time up to the present day without change of a word or punctuation mark. Twelve times the section containing that language has been reenacted or modified, but "intended to take effect in possession or enjoyment at or after death" has gone on forever unchanged.

The *May* v. *Heiner* group, in construing that language, defeated two contentions which the Commissioner of Internal Revenue made from the beginning, *first*, that the retention of a life estate in the grantor in connection with a transfer in trust made the transfer one which was intended to take effect in possession or enjoyment at or after death; and, secondly, that the retention by the grantor of a possibility of reverter, even if remote, had that effect.

This construction of its revenue act, by unanimous decisions of the Supreme Court, must be considered as known to Congress. In 1932 Congress amended Section 302(c) of the Revenue Act of 1926 in order to make more inclusive

the provisions for taxing *inter vivos* transfers than resulted from the interpretation given by the *May* v. *Heiner* group of cases to the phrase "intended to take effect in possession or enjoyment at or after death". In making such amendment Congress did not change that phrase in any way, but inserted an entirely new provision in said Section which required the inclusion of trust property in decedent's taxable estates where decedent grantor had reserved a life interest to himself.

Whether or not this action of Congress indicates a disapproval of the *May* v. *Heiner* decision with respect to the holding that the retention by a grantor of a life interest to himself in setting up a trust does not make a transfer one intended to take effect in possession or enjoyment at or after death, or whether Congress changed its mind with respect to the effect which should be given to such retention of a life estate, is immaterial. In either event Congress, by leaving the phrase in question unchanged and making no further amendment, approved that portion of the rule of the *May* v. *Heiner* group which held that the retention of a possibility of reverter, when remote, did not bring the transfer in trust within the intent of the provision "intended to take effect in possession or enjoyment at or after death."

Thus, it is reasonable to suppose that Congress approved the statement in *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, *supra*, p. 13, that any doubt with respect to the meaning of the Estate Tax Law "must be resolved in favor of the taxpayer", and approved the implementing of that rule in *May* v. *Heiner*, *McCormick* v. *Burnet*, *Burnet* v. *Northern Trust Company*, and other cases, *supra*, by their decisions that the retention of a remote possibility of reverter to himself did not show an *intent* by a grantor of property in trust that the transfer should take effect at or after his death.

It is not reasonable to suppose that Congress amended said Section 302 (c) with knowledge of the *May* v. *Heiner* decisions and failed to make a possible reverter to grantor a ground for the inclusion of trust property in a decedent's taxable estate, if it had not approved those decisions.

FOURTH POINT.

This Court in the *Fidelity-Philadelphia* and *Field* cases, *supra*, did not overrule the *May* v. *Heiner* group.

If the argument of petitioner in the foregoing Point, and, the scores of decisions construing *Helvering* v. *Hallock* as not overruling the *May* v. *Heiner* group are correct, then it is difficult to see how the *Fidelity-Philadelphia* and *Field* cases can be considered as having overruled said *May* v. *Heiner* group. This is so for several reasons:

First: Practically the same judges who constituted the Court at the time of *Helvering* v. *Hallock* also constituted the Court at the time of the *Fidelity-Philadelphia Trust Company* and *Field* cases. If the Court at the time of the *Hallock* case considered that the *May* v. *Heiner* group correctly interpreted the intent of Congress or that the rule of such group was protected by the principle of *stare decisis*, then it is incredible that the same Court, composed of those same members, should overrule the *May* v. *Heiner* group five years later and after scores of cases of lower Courts had held that *Helvering* v. *Hallock* had not overruled the *May* v. *Heiner* group and that the rule of that group was still law.

Second: In the circumstances shown in the preceding Point, the *Hallock* decision not only did not overrule, but indirectly affirmed the rule of the *May* v. *Heiner* group.

THIRD: The reasons which this Court gave in the *Hallock* case for overruling the *St. Louis Trust Company* decisions, and which petitioner showed were reasons *against* the overruling of the *May* v. *Heiner* group, applied with even greater force at the time and in the case of the *Fidelity-Philadelphia* and *Field* decisions.

Moreover the opinions in the *Fidelity-Philadelphia* and *Field* cases, so far from overruling or even disapproving the *May* v. *Heiner* doctrine, give some support thereto. Thus, the only cases cited were *Klein* v. *United States,* 283 U. S. 231, *Helvering* v. *Hallock,* 309 U. S. 106 and *Reinecke* v. *Northern Trust Company,* 278 U. S. 339.

As already stated, the *Klein* case was a unanimous decision by the same judges who decided the *May* v. *Heiner* group and so cannot be considered as contrary to the doctrine of that group and the approval of *Klein* is no disapproval of *Heiner.*

The approval of the *Hallock* case strengthens respondent's argument that this Court in the *Fidelity-Philadelphia* and *Field* cases did not intend to decide anything contrary to what it had decided in the *Hallock* case, and therefore did not intend to overrule cases which the Court in the *Hallock* case had decided should not be overruled.

Reinecke v. *Northern Trust Company* is one of the *May* v. *Heiner* group of cases and stated squarely and positively for the first time the fundamental rule on which the later cases of that group were based. Thus, the theory of those cases, first expressed in *Reinecke* v. *Northern Trust Company,* 278 U. S. 339, was that the intent of the phrase "to take effect in possession or enjoyment at or after death" was not plain and its meaning was in doubt, and that "that doubt must be resolved in favor of the taxpayer."

In considering the broad language of this Court in the short opinions in the *Fidelity-Philadelphia* and *Field* cases

it must be borne in mind that the question here presented, namely, whether a provision in an *inter vivos* trust agreement for a reverter to grantor which is so remote as to be practically negligible brings the corpus of the trust into decedent grantor's taxable estate was not before this Court. In the *Fidelity* and *Field* cases the Courts below had held that provisions for reverter by no means negligible had brought the trust properties into decedents' taxable estates but in each case had deducted the value of life estates. No writ was granted to review those decisions that the trust property was includible in decedent's taxable estate. What this Court did review is stated by it as follows:

In the *Fidelity-Philadelphia Trust Company* case, the opinion begins as follows:

> "Our attention here is directed toward the proper valuation for Federal Estate Tax purposes of the corpus of an *inter vivos* trust where the transfer was intended to take effect in possession or enjoyment at or after death, and where the Settlor retained a life estate in the trust income and a reversionary interest in the corpus."

In the *Field* case, *supra,* the Supreme Court said:

> "The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates."

FIFTH POINT.

Neither the *decision* of this Court nor that of the Circuit Court of Appeals in *Fidelity-Philadelphia Trust Company* v. *Rothensies*, 324 U. S. 108, 142 F. (2) 838, is in conflict with the rule of the *May* v. *Heiner* group and statements in the opinions dealing with entirely different facts should not be considered as overruling *sub silentio* a whole group of cases which had been followed for nearly twenty years.

In the *Fidelity-Philadelphia* case the Circuit Court of Appeals held that the trust property in question was includible in decedent's taxable estate and that the transfer in trust was one which was intended to take effect in possession or enjoyment at or after death.

This Court used very broad and general language in certain portions of its short opinion, and upon its face some of this language is probably contrary to the theory of the *May* v. *Heiner* group of cases. But the opinion must be considered in connection with the matter which was before the Court, which was limited to the question whether or not the value of a life interest to decedent's daughters should be deducted from the value of decedent's gross estate.

In the *Fidelity* case the probability that the trust property would pass under the will of grantor was not remote or insignificant, but was important and substantial. Thus, the chance that the two daughters of grantor in the *Fidelity-Philadelphia Trust Company* case would predecease their mother was stated by the actuary, Corcoran, to be 1 chance in 89 (Record, pp. 72, 75), but this figure does not measure the chance that the property would pass under grantor's

will, because if both daughters died without leaving surviving descendants, the corpus of the trust was to be paid to such persons as the settlor might appoint by will.

Thus, the figure of 89 is much reduced and the chance of the property passing under the mother's will was much greater than 1 in 89. How much greater we cannot say, because it is impossible to determine the probability of these young daughters ten and twelve having issue, and if they had issue, the probability that such issue would survive them.

This is a very different situation from that which existed in the *May* v. *Heiner* group, where the chance of reverter was truly remote, and is very different from the situation in the case at bar, where the chance that decedent would survive her three living issue was only 4 in 10,000, and where her chance of dying without issue was much less—not more than 1 in 10,000 (Finding of fact, R. 87 and R. 71, 74, 75).

All the cases of the *May* v. *Heiner* group cited *supra* at page 13 are important authorities sustaining petitioner's contention that the transfer in trust here in question was not "intended to take effect in possession or enjoyment at or after transferor's death." However, *McCormick* v. *Burnet,* 283 U. S. 784, is on all fours. In that case this Court reversed the Circuit Court of Appeals and held that the corpus of a $7,399,000 Trust created by decedent in her lifetime was not includible in her taxable estate.

The pertinent facts in that case are as follows:

On July 27, 1918, decedent executed a Trust Agreement under which she reserved to herself certain rights and income during her lifetime. The remainder of the income was to be accumulated and added to the principal. The Trust Agreement provided for its termination upon the death of the last survivor of settlor's three children and for distribution upon termination as follows:

> "Upon the termination of said trust as aforesaid, either in whole or in part, the trust estate as to which said trust shall be so terminated shall be paid over and delivered to said party of the first part, if she shall then be living, and in the event that she shall not then be living, shall be paid over and distributed as follows: * * *" (*Comm'r* v. *McCormick*, 43 F. (2) 278).

Moreover, settlor reserved the right to terminate the trust at any time with the consent of any one of her children.

The lives of no issue of any of her children were involved in either the matter of the termination of the trust nor in the disposition of the principal upon such termination, and upon the death of the survivor of the three children during the lifetime of settlor, the property reverted to her.

Here was a direct provision for reverter to the settlor. There was no attempt to show by mathematical computation, as was done in the case at bar, how remote the possibility of that reverter might be. There was not even an attempt to show general remoteness by proving the ages and conditions of health of grantor and her three children.

Thus, the *decisions* in the *Fidelity-Philadelphia Trust Company* case are in no wise inconsistent with the decisions in the *May* v. *Heiner* group, or with the contentions of this appellant.

SIXTH POINT.

The *decision* of this Court in *Commissioner of Internal Revenue* v. *Estate of Field* is not in conflict with the rule of the *May* v. *Heiner* group or with the contentions of appellant in this case.

In the *Field* case, decedent made a trust which was to continue during the lives of two nieces, and the life of the survivor of them, unless sooner terminated. Income was to be paid to the decedent for his life, unless the trust terminated before his death. If decedent died prior to the termination of the trust leaving issue, the trust property was to be held in trust for his children or their issue "*but subject to decedent's right to reduce or cancel the amounts of the gifts by will or written instrument.*" Upon the termination of the trust, before the death of the decedent, the corpus was to be paid over to decedent. The decedent at no time had any issue. Clearly, there is nothing in the doctrine of the *May* v. *Heiner* group, which would have excluded the trust corpus from the decedent's taxable estate upon such a state of facts. There was no need for the Court to invoke any new or different rule. The *Field* trust was in large measure a revocable trust, and of course there can be no valid or conclusive gift in trust until at or after the death of the person having the power to revoke that gift.

The Supreme Court disposed of the question before it in a short opinion of three pages, two pages of which are given to the Statement of Facts, and bases its decision on the *Fidelity-Philadelphia Trust Company* case which was decided just previously on the same day.

Thus, there was nothing in this *decision* which in any way conflicts with the *May* v. *Heiner* group or with appellant's contentions in the case at bar. The opinion must be

read in connection with the facts before the Court. Appellant concedes that the bare words of the opinion, without consideration of the facts before the Court, may well be considered as contrary to her contentions and to the rule of *May* v. *Heiner*.

SEVENTH POINT.

Decedent's actual intent in making her transfer is controlling. The case at bar differs from all other reported cases that appellant has seen in the important respect that here there is direct and conclusive evidence that decedent did not intend her transfer to take effect at or after death.

As above stated, decedent expected to see her great-grandchildren. She was always looking ahead to the time when her grandchildren grew up and got married. She was counting on having the weddings and receptions in her own house and was looking forward to the birth of great-grandchildren. (Rec. fol. 230). These things would have made her death without issue a practical impossibility. No sane person could possibly expect, even as a remote possibility, to outlive a child, grandchildren and great-grandchildren, and Mrs. deBrabant did not.

Moreover, decedent made no effort to take advantage of the power of appointment provided for in the trust instrument. This could only have been because she recognized and knew that it was of no value and was too remote an interest to consider.

This is evidenced by the provisions of decedent's four Wills and one Codicil, dating from 1925 to 1935, wherein she makes provisions for plaintiff, her only daughter, and her issue, but goes no further and omits to include any pro-

vision for the remote contingency that the daughter and her isuse would predecease her (decedent). They show that decedent left such a possibility completely out of her calculations as not worth considering.

Considering the above more in detail:

Decedent, between 1925 and 1935, made four Wills and a Codicil to one of the Wills. These Wills are set out as Exhibits "C-1", "C-2", "C-3", "C-4" and "C-5" to the Stipulation of Facts (Rec. fols. 157-204).

In her first Will of the above series, dated June 8th, 1925, in effect at the time the Trust was established (Ex. "C-2", Stipulation of Facts, Rec. fols. 172-180) Settlor leaves three-fourths of her residuary estate to her daughter (appellant) and one-fourth to her husband, Marius deBrabant, to whom she had just recently been married.

In her second Will of the series, dated January 29th, 1926 (Ex. "C-3", Stipulation of Facts, Rec. fols. 181-189) Settlor gave to her daughter (plaintiff-appellant) and to her daughter's issue, three-fourths of her residuary estate and put one-fourth of her residuary estate in Trust, the income to be paid to her husband for life and the remainder to her daughter or her daughter's issue. *There was no provision over in case neither her daughter nor her daughter's issue should survive her.*

On the 15th of March, 1929, Settlor made another Will (Ex. "C-4", Stipulation of Facts, Rec. fols. 190-201) in which she gave her residuary estate to her daughter, or if the daughter be not living at Settlor's death, to her daughter's issue. *Here, again, there was no remainder over in case neither her daughter nor her daughter's issue should survive Settlor.*

On March 31st, 1931, Settlor, under a Codicil, wherein she revoked a provision for her husband and directed that

the sum so bequeathed should fall into her residuary estate and pass to her daughter or her daughter's issue. *Here, again, there was no provision for any remainder over in the event that neither her daughter nor her daughter's issue should survive her.*

Finally, in her final Will (Ex. "C-1", Stipulation of Facts, Rec. fols. 157-171), Settlor, on July 6th, 1935, gave her residuary estate to her daughter or her daughter's issue, if her daughter should fail to survive her. *Here, again, Settlor made no provisions for the contingency that neither her daughter nor her daughter's issue should survive her.*

Thus, in four Wills, and one Codicil, *all* the Wills Settlor made between 1925 and 1935, including her Last Will, she did not consider the possibility of her daughter and her daughter's issue predeceasing her sufficiently great to be covered in her Wills.

Settlor's attitude in this matter, it is submitted, is strong evidence of her intention with respect to her property. In other words, whether she gave her property by *inter vivos* gift or by her Will, she thought of her only daughter and that daughter's issue as the persons who would enjoy her property.

Finally, it is noteworthy that Settlor never in any of her Wills took the trouble to exercise the contingent power of appointment contained in the Trust Instrument. Apparently, she considered the contingency so remote that she never included an exercise of the power in any of her Wills. There was included, to be sure, in her gift of her residuary estate to her daughter by the 1935 Will, all property over which she might have a power of appointment, but since the gift was to her daughter, it could not have referred to the power included in the Trust Instrument as that power

only came into being if the daughter and the daughter's issue predeceased Settlor.

The importance of decedent's failure to make provision in any one of her wills for the negligible possibility of reverter is emphasized and cannot be considered an oversight by reason of the fact that, as found by the District Court, the same attorney drew all of her wills and the codicil, except her last Will and Testament drawn in 1935, and also drew the Trust Agreement (Stipulation of Facts, Rec. fol. 146).

The dictionary defines "intent" and "intended" as follows:

> "The state of mind in which or the purpose with which one does an act."

As stated above, at the time she made her trust agreement, decedent had a will, and between the time of making the trust agreement and her death she made three additional wills and a codicil. In no one of these wills did she make any provision for the disposition of the corpus (Finding of Fact #1, Rec. fol. 258, fols. 145-146, 157-204).

In view of the above it could not possibly have been the state of mind of decedent at the time she made her transfer in trust that there was any real possibility of her dying without issue, nor could it have been her purpose to have had her trust estate pass under her will.

If decedent, in her Trust Agreement had stopped after providing that the trust property should pass to her issue, if she left issue, at the time of her death, there would have been the remote chance of one out of about ten thousand that the property would revert to her by operation of law. In such case, however, the chance of reverter would have been so remote that the case would have come squarely within the *May* v. *Heiner*, *McCormick* v. *Burnet* doctrine.

The fact that decedent did not stop after providing that the property should pass to her issue, if she left issue, but went further and provided that it should pass under her will, if she left no issue, was not an attempt to apply a string to bring it back to her, but was a further disposition keeping the property away from her and prevented its reverting to her by operation of law.

True, she had the right in the remote contingency that she died without issue to name who should get the property, but this is a lesser right than what she would have had if she had not made the provision with respect to the power of appointment.

In the opinions of both the Circuit Court of Appeals (142 f(2)838) and the Supreme Court (324 U. S. 108), in the *Fidelity-Philadelphia* case emphasis is laid upon the fact that decedent not only reserved a power of appointment in her instrument of transfer, but exercised that right and made a will disposing of the trust property in a manner different from that provided for in the trust itself. As the Courts emphasized this procedure of decedent as showing her *intent,* the procedure of decedent in the case at bar should also be considered as showing *her intent,* namely that she had completely disposed of her property by the trust instrument.

EIGHTH POINT.

The possibility of reverter that has only one chance in ten thousand of occurring would seem to be one of those *minima* concerning which *lex non curat.*

To say that Congress meant the words "intended to take effect in possession or enjoyment at or after death" to apply to a gift in trust, where the chance that the primary

beneficiaries will not survive the donor is as slim as it is in the case at bar, is unduly stretching the meaning of the word "intended" and is attaching undue importance to a very minute or remote possibility.

This Court has frequently in the past applied the principle of *de minimis lex non curat* to matters which are so small that they are negligible. Most recently, the rule was applied by this Court in *Anderson* v. *Mt. Clemens Pottery Company,* 328 U. S. 680, p. 692.

The same rule, it is submitted, should be applied to bar the consideration of a possibility of reverter, that is so remote and insubstantial as to amount to one chance in ten thousand, as any evidence of an intent on the part of the donor of the trust that it is to take effect "in possession or enjoyment" at or after the donor's death.

See also *Maish* v. *Arizona,* 164 U. S. 599.

Conclusion.

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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March 25th, 1947.